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No. 98-595

FILED

NOV 6 - 1998

CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

October Term 1998

MT.HOPE ASPHALT CORP., a/k/a MOUNT HOPE ASPHALT CORP., and BARBARA PETROSKY, as Executrix of the Estate of Frank Petrosky,

Petitioners,

-v.-

MICHAEL ZAGATA, Commissioner of the New York State Department of Environmental Conservation and the NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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THE REPORTER COMPANY, *Printers and Publishers, Inc.*
181 Delaware Street, Walton, NY 13856—800-252-7181
(4875 – 1998)
Printed on Recycled Paper

13 pp

QUESTION PRESENTED

Whether certiorari should be granted to examine petitioners' claims that the State's issuance of a temporary operating license for asphalt production using contaminated soil from certain New York oil spills violated the Commerce and Equal Protection Clauses, where: (1) petitioners voluntarily proposed such terms to address the regulators' environmental concerns over the quality of its production process and to obtain a temporary operating permit; (2) the State does not impose such source restrictions on license applicants by statute, regulation, or policy; (3) petitioners' permanent license application was ultimately denied on other grounds, including falsification of records and use of undocumented contaminated soil; and (4) petitioners' constitutional challenge to the terms of the temporary license was first raised four years after its issuance and following its expiration.

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OPINIONS BELOW

Respondents adopt the statement of opinions below set forth in the petition for a writ of certiorari (Pet. 1).[1]

JURISDICTION

Respondents adopt the statement of jurisdiction set forth in the petition for a writ certiorari (Pet. 1).

Counterstatement of the Case

A. Issuance of a Temporary Air Emissions Permit and the Denial of Permanent Operating Permit

In August 1990, petitioner Mt. Hope Asphalt Corp., a manufacturer of asphalt, sought authorization from respondent New York State Department of Environmental Conservation ("NYSDEC") to utilize petroleum contaminated soil ("PCS") as an aggregate to produce asphalt at its facility in Calverton, New York (AT1379, 1485). PCS is soil contaminated with virgin petroleum and no other hazardous substances, typically the result of accidental spills from fuel trucks or leakage at gasoline stations. Previously, Mt. Hope's production process, and all other asphalt production permitted in New York State, employed virgin petroleum and clean soil.

Petitioners' proposal raised a number of significant public health and environmental concerns: it is quite difficult to

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[1] Numbers in parentheses preceded by "Pet." refer to pages in the petition for a writ of certiorari in No. 98-595. Numbers in parentheses preceded by "A" and "AT" refer respectively to pages in Appellants' Appendix and the Administrative Transcript submitted to the Appellate Division.

distinguish PCS from soils contaminated with waste oil and other hazardous substances; heating soil contaminated with hazardous substances during the production of asphalt could release harmful products into the ambient air; storage of such contaminated soil at the Mt. Hope facility could threaten the underlying aquifer system, a sole source of drinking water; without proper controls, the proposed operation could become a means for the illegal disposal of hazardous wastes.

Aware of the environmental concerns and desirous of addressing them in an economically feasible manner, Mt. Hope proposed that it employ only PCS removed from certain spill sites within New York State, assigned a NYSDEC Spill Number and made the subject of a spill report. By this means, NYSDEC could more easily assure that the PCS was contaminated only with virgin petroleum and no other contaminants (AT104-105, AT1525-1527, 1550, A240). Characterizing this restriction as a "self-imposed condition," Mt. Hope inserted it into its permit application to NYSDEC (A243, "Overview").

In August 1991, NYSDEC issued a one-year interim air permit, including the PCS limitation, allowing Mt. Hope to test the manufacturing process including its pollution control technology. As part of its one year interim permit, Mt. Hope was required to maintain and submit quarterly a log of all PCS deliveries received at the facility (A317-331).

In June 1992, Mt. Hope requested both a one-month extension of its permit and a permit modification that would allow it to utilize PCS from New Jersey during the one-month period (A335, AT1455). NYSDEC granted the extension, but because Mt. Hope proposed no means by which NYSDEC could confirm that the New Jersey PCS was contaminated solely by virgin petroleum and not by other hazardous substances, the agency did not modify the permit (A338). Mt. Hope did not object to or otherwise challenge this determination.

In January 1993, NYSDEC issued an administrative consent order allowing Mt. Hope to continue its operations on a temporary basis pending consideration of its application for a permanent operating permit. (A156-170).

Thereafter, NYSDEC became award that Mt. Hope maintained false logs, submitted false reports, fabricated NYSDEC spill numbers, and utilized PCS unauthorized under its temporary operating permit on thirty-six occasions between November 1991 and September 1992. On September 15, 1993, NYSDEC denied Mt. Hope's application for a permanent operating permit, withdrew Mt. Hope's temporary operating authority, and, shortly thereafter, sought civil penalties for this malfeasance.

Following an eleven-day administrative hearing and the issuance of a sixty-three page hearing report, the Commissioner of NYSDEC accepted an administrative law judge's recommendations and determined, *inter alia*, that Mt. Hope: (1) received and processed 36 shipments of contaminated soil from sites in New Jersey totaling some eighty-eight thousand tons; (2) falsified records by inserting in its Log Book fabricated NYSDEC Spill Numbers for each of those shipments; and (3) submitted a falsified laboratory report with respect to the contaminates in the PCS used at its facility. Based on these and other findings, the Commissioner determined that Mt. Hope and its President Frank Petrosky were "unsuitable and unfit" to hold NYSDEC permits, denied their permit application for a certificate to operate, and assessed $73,400 in civil penalties against Mt. Hope.

B. The Proceeding and Action in State Court

On November 2, 1995, petitioners commenced a proceeding and action before New York State Supreme Court, Nassau County, asserting claims under, *inter alia*, the Commerce Clause, the Equal Protection Clause, and 42 U.S.C. § 1983, and seeking to set aside the Commissioner's determination and remove the self-imposed PCS permit restriction. Following removal of the matter to the Appellate Division, Second Department, pursuant to New York Civil Practice Law and Rules §7804(g), that court upheld the Commissioner's determination in a Decision and Judgment dated March 16, 1998. The Appellate Division found that the Commissioner's determination was supported by substantial evidence in the record and that petitioners' other contentions, implicitly including their fully briefed Commerce Clause and equal protection claims, were "without merit" (Pet. 1a-3a).

The New York State Court of Appeals denied petitioners' motion for leave to appeal by order dated July 9, 1998. (Pet. 124a). Mt. Hope subsequently filed a petition for a writ of certiorari which was docketed by this Court on October 8, 1998.

ARGUMENT

IN THE ABSENCE OF A SUBSTANTIAL CONSTITUTIONAL ISSUE OR ANY CONFLICT BETWEEN THE DECISION OF THE APPELLATE DIVISION AND THE DECISIONS OF THIS COURT OR THE FEDERAL COURTS OF APPEAL, NO REASON EXISTS FOR THE GRANT OF A WRIT OF CERTIORARI IN THIS MATTER

The petition for certiorari should be denied because it fails to raise a substantial constitutional issue worthy of this Court's review and raises no conflict between the decision of the Appellate Division and the holdings of this Court or other

Federal courts. On the contrary, the Commissioner's determination in the instant matter, subsequently confirmed by the Appellate Division, correctly denied petitioners' permit application on ground which petitioners have conveniently failed to address in their petition -- that Mt. Hope had falsified records, failed to disclose the source of its production materials, and demonstrated unsuitability to conduct the activities authorized under the permit (Pet. 7a-11a). Moreover, the PCS limitation here challenged was originally proposed by petitioners to advance their own purposes, was set forth in a temporary permit which has long expired, and had a negligible effect on interstate commerce. Finally, petitioners' constitutional claims are barred by relevant statutes of limitations.

The record in this matter clearly demonstrates that the permit requirement calling for Mt. Hope to utilize PCS only from sites assigned a NYSDEC Spill Number, inserted at petitioners' written request and characterized by petitioners in their permit application as a "self-imposed condition" (A239, 243, 249, 259), was designed to address the State's concern that only soil contaminated with virgin petroleum and no other hazardous substances be utilized in petitioners' asphalt production process (AT1452-1454). Such a business decision by an experienced corporation, designed to minimize its costs of ascertaining and demonstrating the quality of its materials, represents a voluntary, knowing, and intelligent waiver of any conceivable claim to use of out-of-state material and raises no constitutional concerns. *See, Johnson v. Zerbst*, 304 U.S. 458, 468-69 (1938) (circumstances evidencing an "intentional relinquishment of a known right or privilege" constitute waiver); *Faretta v. California*, 422 U.S. 806, 835 (1975).

Contrary to petitioners' contention (Pet. 8), this case does not involve flow control laws comparable to those in *C. & A. Carbone v. Town of Clarkstown*; nor does it involve discrimination against environmentally sensitive materials

originating beyond a state's borders (Pet. 12). New York State has neither statute nor regulation nor policy prohibiting the importation of out-of-state PCS. Nor does the State bar use of out-of-state PCS in asphalt production. Indeed, petitioners concede that New York has granted at least one permit for PCS originating in New Jersey (Pet. 18-19) -- provided that the source of the PCS had been inspected by the New Jersey Department of Environmental Protection. As long as the permittee could reasonably show that the PCS contained only virgin petroleum and was not contaminated by other hazardous substances, its use might be permissible without regard to its state of origin.

In any event, petitioners' Commerce Clause and equal protection challenges to NYSDEC's issuance of the August 1991 permit, raised for the first time at the commencement of this proceeding and action in November 1995, were time-barred under even the longest state law statute of limitations conceivably applicable to such claims. *Wilson v. Garcia*, 471 U.S. 261 (1984) ("most appropriate" period of limitations provided by state law must be applied in Section 1983 actions); New York Civil Practice Law and Rules § 214 (three year statute of limitations to recover damages for injury to property); *see also,* New York Environmental Conservation Law §19-0511(2)(b) (60-day statute of limitations for challenges to permit conditions); *Bitondo v. State of New York*, 182 A.D.2d 948, 950-51 (3d Dept. 1992)(same).

Moreover, the PCS limitation contained in petitioners' temporary license imposed, at the very worst, a small and incidental burden on interstate commerce that is unworthy of this Court's review. It is well established that the Commerce Clause is not violated by a restriction which serves an important public health purpose and poses a relatively small incidental burden on interstate commerce. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1969). This Court has consistently recognized

that "the States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected." *Maine v. Taylor*, 477 U.S. 131, 138 (1985) (citation omitted). State regulations that "burden" interstate transactions only incidentally raise Commerce Clause concerns solely if such burdens are "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, at 142. In the instant matter, the self-imposed limitation on use of in-state PCS, intended by a single manufacturer to allow that State to ascertain the quality of their production materials, had a minimal effect on commerce and a substantial public benefit, and presents no matter of constitutional concern. Significantly, there is nothing in the record to suggest even remotely that NYSDEC would have been indisposed to adopt any alternative effective method of assuring PCS quality.

Finally, petitioners have conceded explicitly that the record in this matter does not support their claim under the Equal Protection Clause (Pet. 5, 16). Indeed, evidence in the record demonstrates that the State treated Mt. Hope in the same manner as other similarly situated asphalt producers: granting permits to the extent that the permittee could reasonable show that the PCS was not contaminated with other hazardous substances.

In sum, the agency determination in this matter, and the Appellate Division holding confirming that determination, were eminently correct in all respects; petitioners' constitutional claims were properly dismissed; and this matter raises no issues worthy of this Court's review.

CONCLUSION

The Petition For a Writ of Certiorari Should Be Denied.

Dated: New York, New York
November 6, 1998

Respectfully submitted,

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